STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN DEPARTMENT OF NATURAL RESOURCES

Plaintiff-Appellee and Cross-Appellant,

v

CARMODY-LAHTI REAL ESTATE, INC., a MICHIGAN CORPORATION

Defendant-Appellant and Cross-Appellee.

Supreme Court No. 124413

Court of Appeals No. 240908

Houghton County Circuit Court No. 97-10318-PZ

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Harold J. Martin (P39234)
John F. Szczubelek (P47902)
Assistant Attorneys General
Attorneys for Plaintiff-Appellee Michigan Department of Natural Resources
110 State Office Building
Escanaba, MI 49829
(906) 786-0169

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QUESTION PRESENTED FOR REVIEW

I. **Mineral Range Railroad was granted a right of way, determined by the Court of Appeals to be an easement. Soo Line, Mineral Range's successor in interest, obtained federal permission to abandon railroad operations across the right of way. It subsequently removed its tracks and sold a portion of the right of way to the Michigan Department of Natural Resources, which developed a recreational trail. Under the circumstances, was the easement extinguished by reason of abandonment or impossibility?**

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Plaintiff-Appellee Michigan Department of Natural Resources (MDNR) takes issue with several of the statements set forth in the Fact statement contained within Appellant's Brief on Appeal.

For the most part, Appellant does accurately set forth the procedural background at pp 1-3 of its Brief, except where it states at p. 2 that the trial court "failed to really address the validity of the transfer of the railroad easement." In fact, the trial court issued its order enjoining further encroachment by the Defendant-Appellant upon the right of way, and ordering it to remove the fence that it erected thereon. (Carmody-Lahti is not complying with this order, more than two years after its issuance.) It cannot be reasonably stated that, having issued such an order, the trial court "failed to really address the validity of the transfer of the railroad easement." It explicitly determined that MDNR holds the valid possessory interest in the right of way, and that Carmody-Lahti is in continuing trespass.

Appellant's statement at p. 3 that Soo Line's grant to MDNR did not contain any reservations is belied by the face of the document (Appellant's appendix 18a); Appellant's continuing allegation regarding Soo Line's payment of property taxes (p. 5) is not contained anywhere in the record, except insofar as MDNR pointed out to the lower court that as a railroad operation, Soo Line was not subject to the General Property Tax; and Appellant's claim that, "Since the right of way was intended to be an easement, a description of purposes, or limitations of use, was included" (pp. 3-4) is conjectural and self-serving.

The procedural status of this case requires that the facts presented to this Court be limited to those set forth in the pleadings and in the documents filed in the Circuit Court in support of the motion for summary disposition. Briefly they are as follows:

In 1873 Quincy Mining Company granted Mineral Range Railroad a right of way over certain property, some of which is now owned by Carmody-Lahti. (Handwritten deed and typed transcription contained in Appellant's appendix, pp. 12a-17a.)

In 1982, Soo Line, Mineral Range's successor in interest, sought and obtained permission from the Interstate Commerce Commission to abandon rail service over the right of way. (Appendix pp. 20a-21a.) Soo Line thereafter entered into negotiations with various parties, including the MDNR and the Michigan Department of Transportation, to sell its interest in the right of way.

Soo Line deeded the subject right of way to MDNR in February 1988 (Appendix pp. 19a-20a) and MDNR thereafter began to maintain a snowmobile/recreation trail on the right of way. Nearly ten years later, in the autumn of 1997, Carmody-Lahti erected a fence upon the right of way, asserting title to the centerline. The assertion contained in Carmody-Lahti's fact statement that, "Just prior to the filing of this litigation, Carmody-Lahti fenced the abandoned easement, and the MDNR moved the snowmobile to the north, where it continues to operate to this day" is misleading. In fact, after the fence was erected, MDNR brought this action seeking to have it removed, and Carmody-Lahti enjoined from further trespass. When it was not successful in obtaining a temporary injunction on the cusp of the 1997-98 snowmobile season, MDNR was therefore compelled to move the trail to the north. As noted above, Carmody-Lahti was subsequently ordered by the trial court order issued April 4, 2002 to cease its trespass and remove its fence. It has not complied to this day.

After an initial grant of summary judgment in Plaintiff's favor on the issue of whether the 1873 deed had passed fee title, the Court of Appeals reversed and remanded to the trial court to determine whether the easement that the Court of Appeals determined had existed was extinguished. The case came before the circuit court on MDNR's summary judgment motion,

testing whether the right of way had been extinguished by reason of abandonment or by reason of a 1920 tax sale of the servient estate. Carmody-Lahti no longer claims extinguishment by the tax sale, and that issue no longer pertains.

The circuit court held that the easement/right of way was not extinguished and that MDNR has a valid interest in possessing the subject property. It ordered Carmody-Lahti to remove the fence it had erected and enjoined Carmody-Lahti from further trespass upon the right of way. The Court of Appeals affirmed. Carmody-Lahti has sought and been granted leave to appeal that decision.

ARGUMENT

I. The Right of Way Easement That Soo Line Conveyed to The Michigan Department of Natural Resources Was Not Extinguished By Adandonment or By Failure of Purpose.

A. Standard of Review

Appellee MDNR concurs in the Standard of Review set forth by the Court of Appeals in its June 3, 2003 opinion, which is that a grant of summary disposition is reviewed *de novo*, that a motion under MCR 2.116(C)(10) tests whether there is factual support for the claim, and that a motion based on lack of a material factual dispute must be supported by documentary evidence.

B. Analysis

1. Railroad Abandonment Does Not Equate to Abandonment of Property Interests.

It is axiomatic that abandonment of rail service is not the same thing as abandonment of the property interest a railroad company has in its right of way, an important distinction recognized in *Strong v Detroit & Mackinac Railway Co.*, 167 Mich App 562, 569; 462 NW2d 266 (1988), and by the trial court and Court of Appeals in this case.

Throughout this litigation, Carmody-Lahti has consistently attempted to blur the distinction between abandonment of rail service and abandonment of property rights. Thus, for example, it stated, at page 5 of its Brief to the Court of Appeals:

> Certainly, if the railroad was arguing that it never intended to abandon its easement, it would be the Plaintiff here rather than the MDNR. The railroad itself indicated its intent to abandon when it used the word "abandoned" to describe the area included in the Quit-Claim Deed to the MDNR.

The Court of Appeals properly noted the well-settled distinction in the law between railroad abandonment and property abandonment in its June 3, 2003 opinion. Carmody-Lahti continues to argue that an easement may only be for a given purpose ("railroad easement"), no

matter the terms of the conveyance, and to cite the ICC abandonment order as evidence of Soo Line's intention to abandon its property rights.

MDNR reiterates that the opposite is true: the very fact of Soo Line's conveyance, as well as the circumstances of the conveyance (contrary to Carmody-Lahti's suggestion, unsupported by any evidence of record, the right of way remains intact from at least the Portage Canal lift bridge to the village of Laurium) is evidence that Soo Line never intended to abandon its right of way.

What Soo Line had "abandoned" was rail service over and upon the right of way, and for that it was compelled to seek and receive federal permission. Because of the public interest in railroad transportation, the federal government has regulated railroads since 1887, when it created the Interstate Commerce Commission. With passage of the Transportation Act of 1920, 41 Stat. 456 (1920) (codified in scattered sections of 49 U.S.C.) the United States extended its regulatory authority to abandonment of rail lines. See, generally, 23 Transp. L.J. 1 (1995). When a railroad company desires to discontinue service on a particular line, because, for example, it is unprofitable, it must seek and receive permission, formerly from the Interstate Commerce Commission, now from the Surface Transportation Board (STB) of the U.S. Department of Transportation. 49 USC 10903.

The STB approval of abandonment "is only a determination that ... cessation of service would not hinder ICC's purposes. It is not a determination that the railroad has abandoned its lines." *Vieux v East Bay Regional Park Dist*, 906 F2d 1330, 1339 (9th Cir, 1990).

Significantly, the September 1982 Certificate and Decision mandated at least temporary preservation of the property interest:

> Soo Line shall keep intact all the right-of-way underling [sic] the track, including all the bridges and culverts, for a period of 120 days from the decided date of this certificate and decision *to permit any state or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of the right-of-way.*

(Appendix 20a, emphasis added.)

This was in keeping with the national policy of preserving rail corridors as expressed in the Rails to Trails Act, 16 USC 1247(d), and is also consistent with Michigan public policy as expressly stated by the Legislature: "The preservation of abandoned railroad rights of way for future rail use *and their interim use as public trails* is declared to be a public purpose." MCL 474.51(3) (emphasis added.)

2. Soo Line Never Abandoned Its Property Interest.

In order to prove abandonment of an easement interest, a clear and decisive action must be established exhibiting an intention to abandon. *Strong*, *supra*; *McMorran Milling Company v Pere Marquette Railway Co*, 210 Mich 381, 393-394; 178 NW 274 (1920). Mere nonuse is not sufficient to establish that intent, but must be accompanied by some act showing a clear intent to abandon. *McMorran*, *supra*, *Strong*, *supra*, *Ludington & Northern Railway v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991).

In *Strong*, the Court of Appeals addressed a challenge to an "abandoned" railroad right of way that was missed by Burton Abstract Company when the plaintiff purchased undeveloped land in 1974. The railroad tracks had been pulled up in the 1950's and the right of way had not been used for approximately thirty years before litigation was filed. In those circumstances the Court stated:

> The essential elements of abandonment are intent to relinquish the property and acts putting that intention into effect. *Van Slooten v Larsen*, 410 Mich 21, 50; 299 NW2d 704 (1980), appeal dismissed 455 US 901 (1982); *Emmons v Easter*, 62 Mich App 226, 237; 233 NW2d 239 (1975). Nonuse by itself is insufficient to show abandonment. *Emmons*, *supra*, p 237. [167 Mich App at 569]

The Court of Appeals went on to agree with the trial court that removing tracks did not indicate intent to abandon the right of way. The fact that the right of way was not being used by the railroad for its operations was not found to be evidence of intent to abandon and relinquish the property.

Such is the record in this case. Mineral Range's successor, Soo Line Railroad, abandoned operation of the line sometime after receiving ICC permission to do so in 1982, but never evidenced intent to abandon the property right. Quite to the contrary, Soo Line's conveyance of the abandoned right of way to MDNR and the Michigan Department of Transportation (for use *as* right of way), for valuable consideration, gives evidence of its intention to preserve its continued claim of right. Certainly, if it had been Soo Line's *intent* to abandon its property interest (see the foregoing authority) it would not have entered into negotiations and then sold the interest. This is clear evidence of lack of intent to abandon, let alone of overt action taken to put such intention into effect.

Carmody-Lahti's Brief on Appeal at page 9 lists various factors that it proposes collectively should lead this Court to the conclusion that the property right was abandoned. With the exception of the suggestion of impossibility of purpose, which will be argued in the next section of this Brief, each and every one of these factors is either shown to be irrelevant by the argument above, or is not of record.

For example, the existence of the Armstrong-Thielman Lumber Company for some time alongside the right of way has no bearing whatsoever on this case, although Carmody-Lahti would suggest that its absence somehow defeats the purpose of the right of way. To the extent that it may be said to address the existence of Armstrong-Thielman, the record indicates that the railroad operated long before, and long after, the presence of that business. Simply put, the later

existence of Armstrong-Thielman had no bearing whatsoever on the grant, or the ongoing validity, of the right of way.

There is no evidence in the record regarding payment or non-payment of property taxes by Soo Line; MDNR pointed out at the trial court level that while the railroad operated, it was not subject to the Michigan general property tax. Neither does the record contain evidence of conveyances severing the right of way. As indicated above, the right of way corridor remains uninterrupted from Hancock to Laurium.

In fact, Carmody-Lahti has never presented any evidence [beyond ICC abandonment and the removal of tracks], of any overt actions by Soo Line evidencing the least indication of any intent to abandon its property interest. As the party opposing summary disposition, it was Carmody-Lahti's burden to establish a genuine issue of fact. *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619, 626; 425 NW2d 480 (1988), *Belmont v Forest Hills Public Schools*, 114 Mich App 692, 696; 319 NW2d 386 (1982), lv den 422 Mich 891 (1985). It clearly did not do so.

3. The Easement Was Not Extinguished By Reason of Failure of Purpose or Impossibility.

Carmody-Lahti has come, if not quite fully, to recognize that abandonment of the railroad operations, and Soo Line's reference in the deed to MDNR to its "abandoned railroad right of way", do not equate to willful abandonment of its easement rights. Alternatively, Carmody-Lahti emphasizes its claim of the supposed limitation of the grant of right of way to railroad purposes only. It argues, without citing authority, that Soo Line's conveyance of the right of way to a non-railroad entity (the State of Michigan) defeated the purpose of, and thus extinguished, the easement.

It continually refers to the "railroad easement" or "railroad right of way" when in fact what was granted was "a right of way for [a] railroad." Although this may at first blush seem

like a distinction without a difference, it is MDNR's position, supported by the Court of Appeals, that what was passed was a "right of way" and that the term "for its railroad" was merely a recitation that the grant was for a lawful purpose, which was typical under common law conveyances. *Quinn v Pere Marquette Railway Co.*, 256 Mich 143, 151; 239 NW 376 (1931).

In its insistence that an easement may be granted only for a specific purpose and no other, and that when that purpose ceases to be fulfilled the easement terminates, Carmody-Lahti misconstrues or indeed mischaracterizes the authority it cites. For example, at p.13 of its Brief on Appeal, it writes, "A statement of purpose is the essence of an easement, as argued above and as stated in the Restatement of Property, Section 450 at 2901 (1944)..." Section 450 in fact states, in its entirety:

> An easement is an interest in land in the possession of another which
> (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
> (b) entitles him to protection as against third persons from interference in such use or enjoyment;
> (c) is not subject to the will of the possessor of the land;
> (d) is not a normal incident of the possession of any land possessed by the owner of the interest; and
> (e) is capable of creation by conveyance.

There is patently no mention of a "statement of purpose" in this passage, as suggested by Carmody-Lahti. Furthermore, in the commentary the following is said about the term "use or enjoyment":

> The phrase "use or enjoyment" comprehends all ways in which the benefits resulting from the ownership of an easement are received. It includes use by action of the owner of the easement on the land subject to the easement, as by *walking over such land in the exercise of a right of way*, * * * It includes, also, enjoyment through inaction by the possessor of the land subject to the easement, as by continued receipt of light and air from and over the land subject to the easement. *Id* (emphasis supplied).

Easements are simply not the narrow, highly constrained, and ephemeral creatures that Appellant argues they are.

Significantly in this case, there was no reverter clause in the October 1873 instrument between Quincy Mining Co. and Mineral Range RR, nor any other indication that the easement would be extinguished upon non-use for railroad purposes. Although the habendum states that the conveyance is for Mineral Range RR "to have and to hold the said strip of land with the appurtenances, for the purpose and uses above stated . . ." the only reservation is of the mineral and mining rights. "It seems to be the weight of authority that, where there is no reverter clause, a statement of use is merely a declaration of the purpose of the conveyance, without effect to limit the grant." *Quinn, supra* at 151.

Although it is true, as Carmody-Lahti states, that *Quinn* found the parcel in question in that case was owned in fee title, the decision nevertheless represents a comprehensive review of railroad property law, and many of the principles enunciated apply to easement as well as fee interests. Thus, it followed the above quoted sentence by observing,

> The reasoning is that, as a railroad company may take real estate only for railroad purposes, the declaration that it is to be so used is merely an expression of the intention of the parties that the deed is for a lawful purpose. *Id* (citations omitted.)

Michigan courts have in fact ruled that easements have been extinguished by impossibility of purpose, but those cases are distinguishable from the one at bar, and MDNR is aware of no case holding that conveyance to a non-railroad entity automatically extinguishes a railroad easement; again, Carmody-Lahti cites none on that point.

In *City of Boyne City v Crain*, 179 Mich App 738; 446 NW2d 348 (1989), the Court of Appeals affirmed the circuit court's finding of extinguishment by impossibility insofar as the claimant was physically prevented from reaching his parcel (i.e. "landlocked") due to the abandonment and/or tax reversion of adjoining parcels.

That is not the case here. It is undisputed by any evidence that the parcel in question is fully accessible at both ends, being a small segment of an extensive Upper Peninsula-wide network of trails maintained by MDNR.

Carmody-Lahti places great reliance upon *Belka v Penn Cent. Corp.*, unpublished opinion of the U.S. District Court for the Western District of Michigan, decided October 14, 1993 (File No 1:92-CV-581); affirmed without opinion, 74 F3d 1240 (6th Cir. 1996). MDNR submits that the case is not authority, that it was wrongly decided, and that in any event it is highly distinguishable on the facts. Contrary to the instrument in the present case, which refers to a "right of way for its railroad" (which was apparently already built, or at least laid out), the deed in *Belka*, as quoted by the trial court, stated that it was

> ...for the said party of the second part and their assigns and their servants and agents to build, construct and maintain a Rail Road in and over the said strip of land, and at all times freely to pass and re-pass by themselves, their servants, agents, employees, with their engines, carts, horses, cattle, carts, wagons and other vehicles, and to transport freight and passengers, and to do all other things properly connected with or incident to the location, building, maintaining, and running the said Road, and to use the earth and other materials within said strip of land for that purpose... (Appendix, p. 23a).

There is nowhere in the deed from Quincy to Mineral Range any language that approaches setting forth such detail of purpose. In this case, it cannot be said that discontinuing rail service over the right of way or conveying to a "non-railroad entity," defeats the purpose of the easement. The easement was granted to allow a "right of way" i.e., a right of passage across the servient estate. The fact that the conveying document used the term "railroad" did not serve to limit the conveyance, and there was no defeasance clause extinguishing the easement in the event of non-railroad use, nor any other language in the conveying document to the effect that the right of way was "for railroad purposes and no other," or that it was to "build, construct and

maintain a Rail Road", "do all other things properly connected with or incident to the location, building, maintaining, and running the said Road", etc.

In fact, the grant of right of way was broad in scope, assignable, and "forever." It cannot be gainsaid that at the time that the right of way was granted, railroads were the transportation of choice, and the primary method for transporting goods and people anywhere beyond their local community. The mere fact that times and technology have changed, and that the railroad became no longer a necessity in this location does not defeat its purpose as a transportation corridor, which purpose continues to this day. Nor is it clear that there will never again be a railroad use. As indicated previously in this brief, preservation of abandoned railroad corridors has been made a public goal at the federal level, by the Rails to Trails Act, 16 U.S.C. 1247(d), and at the state level, by the State Transportation Preservation Act, MCL 474.51(3), a fact recognized by the trial court in *Belka* notwithstanding its ultimate decision.

CONCLUSION AND RELIEF SOUGHT

In 1997 Defendant-Appellant Carmody-Lahti unilaterally entered upon the subject right of way and erected a fence enclosing part of the right of way along its border with Carmody-Lahti's property.

The Houghton County Circuit Court has twice held that the right of way was lawfully conveyed by Soo Line Railroad to Plaintiff-Appellee MDNR. Its most recent decision to that effect was upheld by the Michigan Court of Appeals.

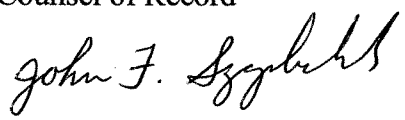
Because the property right in the right of way has never been abandoned, and because there was no clause in the original deed dissolving the easement in the event of non-railroad use; and further because the easement continues to serve as a right of way, Carmody-Lahti's actions were and are in violation of MDNR's valid property rights.

Appellee MDNR asks that the Court affirm the Court of Appeals order in turn affirming the trial court's decision in its favor.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record



Harold J. Martin (P39234)
John F. Szczubelek (47902)
Assistant Attorney General
Attorneys for Plaintiff-Appellee Michigan
Department of Natural Resources
110 State Office Building
Escanaba, MI 49829
(906) 786-0169

Dated: September 1, 2004

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